STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 97-583

January 30, 1998

PUBLIC UTILITIES COMMISSION,
Rulemaking: Consumer Education
Program (Chapter 302)

ORDER PROVISIONALLY ADOPTING RULE AND STATEMENT OF FACTUAL AND POLICY BASIS

WELCH, Chairman; NUGENT and HUNT, Commissioners

I. INTRODUCTION

In this Order, we provisionally adopt[1] a rule governing the implementation of a consumer education program to educate the public about the implementation of retail access and its impact on consumers. The Maine Legislature has decided that all Maine electricity consumers shall have the right to purchase generation services from competitive providers beginning on March 1, 2000.[2] The legislation requires the Commission to adopt a rule to implement a consumer education program to educate the public about retail access and its impact on consumers.

II. STATUTORY REQUIREMENTS

Title 35-A, section 3213(2) directs the Commission to organize a Consumer Education Advisory Board (CEAB) to investigate and recommend methods to educate the public about the implementation of retail access and its impact on consumers. The statute further directs the Commission to ensure "broad representation of residential, industrial and commercial electric consumers, public agencies and the electric industry on the Board." 35-A M.R.S.A. §3213(2).

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[1]Because the rule is a "major substantive rule" as defined and governed by 5 M.R.S.A §§ 8071-8074, the Legislature must review the provisional rule and authorize its final adoption either by approving it with or without change or by taking no action. 5 M.R.S.A. § 8072.

[2]During the 1997 Legislative session, the Maine Legislature enacted P.L. 1997, Chapter 316, "An Act to Restructure the State's Electric Industry," (the Act) codified as Chapter 32 of Title 35-A (35-A M.R.S.A. §§ 3201-3217).

Section 3213(2) directs the CEAB to address the following matters in its recommendations to the Commission:

(1) the level of funding necessary for adequate educational efforts and the appropriate source of that funding;

(2) the aspects of retail access on which consumers need education;

(3) the most effective means of accomplishing the education of consumers;

(4) the appropriate entities to conduct the education effort; and

(5) any other issue relevant to the education of consumers regarding the implementation of retail access and its impact on consumers.

Id. Finally, the legislation requires the Commission to consider the recommendations of the CEAB when it adopts rules.

III. CONSUMER EDUCATION ADVISORY BOARD

After soliciting nominations, the Commission organized the CEAB consisting of 15 members.[3] In accordance with the statute, members of the CEAB included representatives of residential, industrial and commercial electric consumers, public agencies, and the electric industry.[4] The CEAB submitted its recommendations to the Commission on October 27, 1997. The provisional rule incorporates most of the CEAB's recommendations.

IV. RULEMAKING PROCESS

[3]Board membership dropped to 14 after one member resigned.

[4]The following individuals served on the Consumer Education Advisory Board: Donald Berry, Sr. (Chair), Representative, State Legislature; Dan Allegretti, Director, ENRON Corporation; Ellie Bickmore, Maine Grocers Association; Eric Bryant, Office of the Public Advocate; Debbie Burd, Executive Director, Western Mountains Alliance; Dan Dauphinee, Operations Manager, Northeastern Log Homes, Inc.; Carla Dickstein, Coastal Enterprises, Inc.; Geoffrey Green, Manager, Revenue Operations, Central Maine Power Company; John Knox, residential consumer and retired communications professional; Pat Kosma, Director Kennebec Valley Consumer Action Program; Laurie LaChance, State Economist, State Planning Office; John Marvin, Maine Council of Senior Citizens; Chet Oiler, Manager, Kennebunk Light & Power District; and Matthew Thayer, Director, Consumer Assistance Division, MPUC.

On November 6, 1997, we issued a Notice of Rulemaking and proposed rule regarding the Consumer Education Program. Consistent with rulemaking procedures, the Commission provided interested persons an opportunity to file written comments on the proposed rule. The following persons provided written comments: Central Maine Power Company (CMP); Bangor Hydro-Electric Company (BHE), Maine Public Service Company (MPS); the Coalition for Sensible Energy (CSE); the Independent Energy Producers of Maine (IEPM); Coastal Enterprises, Inc. (CEI); the Public Advocate; and John Knox. In addition, the Commission held a rulemaking hearing to allow interested persons to provide oral comments and to respond to questions regarding their position. The following persons participated in the hearing: BHE, CMP, Rep. Donald Berry, Sr., CSE, American Association of Retired Persons (AARP), and Van Buren Light and Power Company.

The Commission appreciates the efforts of interested persons in providing comments on the issues relating to the design and implementation of a consumer education program. The Commission found the comments helpful in developing the provisional rule. The Commission also appreciates the work of the Consumer Education Advisory Board which developed recommendations to the Commission on issues relating to the development of a consumer education program. These recommendations form the basis for the rule we provisionally adopt today.

V. DISCUSSION OF PROVISIONAL RULE AND COMMENTS

A. Sections 1 and 2: Purpose of the Rule and Definitions

Section 1 states the purpose of the provisional rule. Section 2 contains definitions. Some of the definitions are included in the statute (35-A M.R.S.A. § 3201) and are included in the proposed rule for convenience.

MPS commented that the definition of “utility-sponsored educational activity” should be amended to exclude “any activity that is undertaken by the utility as the result of a direct solicitation by a customer or other interested person (e.g. a legislator).” (emphasis in original). Although MPS supported the rule’s exclusion from rates of the costs of utility-sponsored educational activities,[5] it was concerned that, under the proposed definition, the transmission and distribution (T&D) utility will be hampered from responding effectively to customer requests for information about retail access. MPS states that it is likely that customers will seek information from the T&D utility.

[5]See section 6(A) of the proposed rule.

BHE also commented that the T&D utility should be able to respond to customer calls for information about retail access without having expenses for such activities disallowed in rates. CMP concurred that customers should not be referred away from the utility when seeking information from the utility. The Public Advocate, although supportive of the exclusion from rates of costs for utility-sponsored educational activities (see section 6(A)), expressed a concern that the proposed rule might prohibit a utility from answering questions from customers who initiate the contact.

We agree with MPS, BHE, CMP and the Public Advocate that the rule should not have the effect of preventing electric and T&D utilities from responding to customer requests for information. We therefore have narrowed the definition of a utility-sponsored education activity to make clear that an activity that is sponsored by the electric or T&D utility to provide education about electric restructuring will not be considered a utility-sponsored education activity unless the activity is initiated by the electric and T&D utility. Thus, the costs of responding to customer requests for information will not be excluded from rates under section six of the provisional rule. This modification, in our view, strikes a balance between allowing the utility to respond to requests for information and avoiding having ratepayers pay for educational activities undertaken by the utility that are already provided by the consumer education program. We may occasionally monitor utility responses to customer inquiries to ensure the accuracy and neutrality of information conveyed to the customer.

B. Section 3: Program Scope

Subsection 3(A) of the provisional rule describes the consumer education program (CEP) goals.[6] The goals are those identified by the CEAB. CSE agreed with the program goals but noted that the program should not just provide information but should motivate customers to consider themselves "customers who will have many more choices and options in a competitive

[6]Subsection 3(A) of the provisional rule lists the following goals of the consumer eduction program:

1. increase consumer awareness of retail access and related issues;

2. facilitate informed consumer decision-making about choices resulting from retail access;

3. provide to consumers an objective and credible source information relating to retail access.

electricity market." CSE also noted that the objective and credible source of information listed in goal number three should include providing information about "various cost, contract terms and lengths and fuel sources for all suppliers to *all citizens*." (emphasis in original). John Knox commented that goal number three is redundant because that goal is incorporated in goal number two. Mr. Knox suggests that the third goal should be "to seek to create a positive attitude toward these changes."

We have not modified in the provisional rule the goals identified by the CEAB and incorporated in the proposed rule. Although we see the development of a positive attitude toward retail access as a salutary outcome of meeting goals one through three, we do not see a need to modify the reasonable and attainable goals identified by the CEAB. In addition, we do not add more detail in the section on goals to identify the specific information that will be provided. More detail on the topics of education is more properly addressed in Subsection C discussed below.

Subsection 3(B) identifies the target audience for the program. The program is targeted to residential, small business consumers and municipal consumers. The provisional rule does not contain a definition of small business consumers. We anticipate that the program will target those businesses that, due to their small size, do not have sufficient resources to educate themselves to make informed decisions about issues relating to retail access. In the notice of rulemaking, we invited comments on (1) whether the rule should contain a definition of small business consumer, and if so (2) the criteria for such a definition, i.e. whether the definition should be based on usage, number of employees or some other factor. No commenters, however, proposed a definition of small business consumer.

The CEAB has used the term "small commercial consumer" rather than the term "small business consumer" to identify consumers who "are *not* apt to have the clear financial incentive or wherewithal to research the changes in the market necessary to make informed decisions." The CEAB suggested that the number of employees may be the appropriate criterion for identifying the non-residential audience whom the program should reach. We use the term "business" rather than "commercial" because many electric utilities have a rate class for commercial consumers that does not include small industrial consumers. Because the program is targeted to both small industrial and commercial consumers, the use of the term "small business consumer" will help to avoid confusion. This term also includes, of course, religious, community and educational institutions and organizations that take service at commercial rates but would not ordinarily be considered businesses.

The CEAB also recommended that the Commission tailor the program so that it meets the needs of certain residential consumers who may have needs different from those of other residential consumers. Residential consumers in this category include: low-income consumers, senior citizens, disabled consumers, the illiterate or functionally illiterate, and consumers who do not speak English or for whom English is a second language. While we have not identified this subgroup of residential customers in this section of the provisional rule, we will consider the best methods of reaching these residential consumers when we develop our Consumer Education Plan, discussed below.

CSE agreed with the proposed rule's targeted consumer groups. CEI commented that the Consumer Education Plan should emphasize educational outreach to very small businesses, which CEI identifies as those with fewer than 20 employees. CEI also suggested that the plan should be directed toward those small businesses with relatively high energy needs, such as wood products businesses, grocers or restaurants. CEI commented that the smallest businesses usually do not have the financial resources to research the energy market.

John Knox commented that targeting the consumer education program to all residential consumers "is not helpful and is unrealistic." Mr. Knox suggested that the program should target only those residential consumers with special needs such as: low- income consumers, senior citizens, disabled consumers, the illiterate or functionally illiterate, and consumers who do not speak English or for whom English is a second language.

We do not modify the target audience from the proposed rule. In response to CEI's comments, we agree that small business of the type described in the comment should be targeted. The targets listed in the rule include these types of small businesses. We envision that the consumer education plan will contain more detail about how each target group should be reached and the resources to be directed towards educating each subgroup, such as very small businesses or residential consumers with special needs. As provided for in section five of the provisional rule, the plan will be available for public comment before its final adoption. We disagree with Mr. Knox that the only residential customers that should be targeted by the program are those with special needs. We believe that the potential for confusion about choices available under electric restructuring exists among all residential customers not just those with special needs[7]. Thus, we believe that, to avoid consumer

[7]See, e.g., Edward Holt and Jeffrey M. Fang, "The New Hampshire Retail Competition Pilot Program and the Role of Green Marketing," November 1997, at 5 (citing a survey in which many

confusion about the choices available under electric restructuring, it is imperative that the program be targeted to all residential customers.

Subsection 3(C) of the provisional rule lists the topics for the educational program and provides us with the flexibility to include additional topics as the need arises.

CSE and CEI emphasized the importance of uniform disclosure requirements. CSE also suggested making the “effects of energy choice on our environment" a topic of education. John Knox stated that the topics of education should have been prioritized by the CEAB because the CEAB members were better qualified than a communications contractor to know which topics are most important.

We have not modified the CEAB's topics of education. We agree that uniform disclosure requirements are important to developing consumer awareness of the choices made possible by retail access. We note, however, that uniform disclosure is a topic of education under subsection 3(C). We further note that uniform disclosure is the topic of a separate rulemaking required pursuant to 35-A M.R.S.A § 3203(3). For these reasons, the provisional rule, as well as our future information disclosure rulemaking will address concerns about customer awareness of uniform disclosure requirements. Because the provisional rule's topics of education include uniform disclosure requirements, which are expected to contain information about emissions of various generation sources and renewable energy resource programs, we do not agree with CSE that there should be an additional specific topic addressing the environmental effects of various generation sources.

Subsection 3(D) lists methods of education and includes those methods recommended by the CEAB. The CEAB suggested that many of these methods are complementary and that they should be used in an integrated fashion. The provisional rule includes one additional possible method of education suggested by CSE.

CSE also suggested that an additional method of education that may be included in the plan is the staffing of booths at regional fairs, home shows, garden shows and similar events. In addition, CSE suggests that television public service announcements should be targeted to women who are at least 25 years old. Finally CSE suggests that public meetings to promote consumer education should be coordinated, if possible,

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residential, industrial and commercial electric consumers who were participants in the pilot stated that providing consumers with more accurate information would help ensure competition that best serves customer interests).

with regularly scheduled meetings of civic, commerce, trade and environmental groups.

John Knox commented that the CEAB recommendations should have indicated the CEAB's preference for various methods of education. Mr. Knox also stated his concern that the methods not be mandated to the communications contractor, and suggested instead that the RFP include a proposal for the use of these methods with a comparative cost-benefit analysis per consumer.

CSE suggested that new vocabulary should be used to engage the public to help foster understanding of concepts and choices. CSE noted that such terms as "restructuring" and "retail access" are confusing for consumers. The AARP concurred that the message has to be simple and understandable.

We agree with those commenters who suggested that the message should be simple and easy to understand. The CEAB in its recommendations also indicated that, in developing program materials and messages, the consumer education program should consider literacy levels. The recommendations suggest that messages should be targeted at a third or fourth grade reading level. We envision that simplicity and understandability will be an important factor in developing messages and materials as part of the consumer education program. However, we do not see a need to explicitly incorporate these concepts into the framework of the rule.

We have adopted CSE's suggestion of adding booths at fairs, home shows and similar events as a possible method of education. We agree that these types of events may provide a useful opportunity for customer education.

We have not adopted the suggestions of CSE and Mr. Knox that focus on the details of how the methods will be used together. We agree with the CEAB that the methods listed are complementary and should be used in an integrated fashion. In developing the Consumer Education Plan, with the likely assistance of a communications contractor and with advice from the advisory board to be formed pursuant to this provisional rule, we will focus on the details of how these methods should be integrated and prioritized.

D. Section 4: Funding

Subsection 4(A) identifies the maximum level of funding for the program as $1,600,000. This is the amount the CEAB recommended. To the extent that the revenues from the assessments used to fund the program are not used by the end of the program, the proposed rule provides that the unspent amount will be returned to the assessed utilities by reducing their next

annual assessment. The returned funds will be flowed through to ratepayers in an appropriate rate setting proceeding.

The CEAB noted that the estimated level of funding in other states that have proposed or approved consumer education programs is about $1 per resident and that the approved funding for California's consumer education program is approximately $3 per resident. The CEAB estimates that its recommended level of funding is about $1.30 per capita which it determined was within the range of funding per capita for plans in other states.

BHE suggested that the level of funding may be inadequate. CSE questioned whether the amount was too high. We find that the maximum level of funding arrived at by the CEAB is reasonable.

Subsection 4(B) identifies the source of the funding. Funding will be provided by a special assessment on all electric and T&D utilities subject to assessment under 35-A M.R.S.A. § 116. The assessment will be based on a percentage of revenues and will be designed to raise no more in total than the specified amount per year identified in the rule.

The provisional rule further provides that the assessment is a just and reasonable operating cost for ratemaking purposes and that utilities may recover the cost from ratepayers. The rule further explicitly states that these amounts may be recovered even if the costs are incurred while the utility rates are governed by a rate cap plan. This provision is unchanged from the proposed rule.

The CEAB recommended that the program be funded from fees paid by competitive generation providers and that customers of distribution utilities should be charged for any unrecovered balance to the extent that fees assessed to generation providers appear impracticable or inadequate to fully recover the costs of the CEP over several years. The CEAB recommended that electric utilities initially pay for the costs of the consumer education program but that after retail access begins the T&D utilities would be reimbursed from fees paid by competitive generation providers.

The CEAB stated, "We believe that a funding mechanism that places the costs of the CEP on competitive providers and/or their customers, the companies and individuals that will benefit from retail access, is the most appropriate mechanism provided that the Commission determines that it is workable and that it would not be a 'a barrier to entry' into the market for competitive providers." The CEAB recommendations also suggest that the Commission should determine an equitable method for funding from competitive providers that "will avoid the creation

of incentives for competitive providers to influence the size of their customer base near the time of assessment of the fee to support consumer education."

Several commenters on the proposed rule echoed the recommendations, and suggested that options with competitive provider funding are preferable to those without such funding.[8] All commenters on this issue appeared to agree that it is appropriate to initially fund the program through a charge to electric and T&D utilities. The comments are summarized below. Interested persons who suggested cost-recovery from competitive providers are BHE, CMP, the Public Advocate, and Rep. Donald Berry, Sr.

BHE commented that the program "should be funded through a variety of assessment mechanisms including but not limited to fees paid by competitive electricity providers, and, as necessary, by customers of the transmission and distribution companies..." CMP stated that the Commission "should adopt a funding mechanism to recover a reasonable portion of consumer education program costs from energy suppliers." CMP suggested that

> An assessment could be charged to energy suppliers after the first full year of retail competition. This assessment would be prorated, based upon each supplier's share of the total market in the state. In this way, some portion of program costs could be recovered from energy suppliers, and each supplier's share of the total cost would be proportional to its share of the total market at the end of the first year of retail competition.

CMP does not believe that the charge would be a barrier to entry because the amount charged to suppliers would be something less than the total cost of the program and would be proportional to that supplier's share of the total market.

The Public Advocate stated that it "is not appropriate for ratepayers to be required to pay *all* the costs of the program ... Recovering some of the costs through competitive suppliers would allow for the possibility that not all of these costs would reach ratepayers." Rep. Donald Berry, Sr., Chair of the CEAB, testified during the rulemaking hearing that "the competitive energy supplier should share in the funding of the consumer

[8]The commenters all appear to use the term "competitive providers" to exclude competitive providers providing standard offer service.

education program. . . . It may not be the most convenient (approach), but we (the Board) feel it is the most equitable."

The IEPM supported the Commission's approach. IEPM stated that "[a]ssessing utility and T&D facilities for the costs of the education program is appropriate and efficient." It also noted that "for the sake of simplicity and efficacy of program implementation, we support the PUC's proposed funding source."

Thus, we are presented with the following options: (1) assess all consumers for the cost of the program through a charge on the electric and T&D utilities that may be passed through to customers; (2) assess some or all of the costs of the program to competitive energy providers excluding standard offer providers; or (3) assess some or all of the costs of the program to competitive providers including standard offer providers. Under option two or three, electric and T&D utilities and their customers would presumably bear the costs not covered by fees on the competitive providers. For the reasons discussed below, we have chosen the first option.

We do not agree with the CEAB's rationale that competitive energy providers and their customers should pay some or all of the costs of the education program since these persons benefit from retail access. Instead we find that the primary beneficiaries of the program -- namely, all consumers -- should bear the cost. We believe that all consumers of electricity have the opportunity to benefit from the consumer education program, whether they take standard offer service or receive service from a competitive provider. The Consumer Education Program (CEP) aims to inform consumer decisions on selection of energy providers, regardless of whether consumers ultimately select competitive suppliers or the standard offer. In addition, the CEP will provide information on many other aspects of restructuring, such as the purposes of restructuring, industry structure, the Do-Not-Call list, and low income bill assistance programs. Clearly, program benefits are not limited to customers of competitive providers.

We further disagree with the Public Advocate's assumption that consumers will benefit from such an assessment because competitive providers may choose not to pass the cost on to their customers. We do not find any support in the record for this assumption. Moreover, even if we accepted the assumption, we would be engaging in cost shifting were we to assess the costs to competitive suppliers. Having concluded that program beneficiaries should pay for the cost of the program, our assessment of a fee to competitive providers would shift the cost of the program from the beneficiaries to other entities. In addition, we are concerned about the negative signal this approach would send to prospective competitive providers.

We also are unconvinced by CMP's argument that the charge could not pose a barrier to entry. It is difficult to make the market entry barrier determination in the abstract. Part of the determination depends on how competitive providers would be assessed. For example, if the percentage of customers to total market excludes from the total market standard offer customers, the fee could be quite large depending on the number of competitive generation providers. Thus, there is a potential market barrier problem. If on the other hand the total market includes standard offer customers, there may be less of a problem of "barrier to entry." However, under this scenario the amount recouped from competitive providers may not be significant enough to justify the cost of implementing a complex funding and reimbursement system.

We are also concerned that a funding mechanism that may result in higher rates for service from competitive providers than standard offer service providers may discourage competition. Any assessment mechanism should be competitively neutral with respect to competition and the standard offer.

Finally, we do not see a significant difference between the Public Advocate's proposal and the mechanism set forth in the provisional rule unless we accept the assumption that some costs may not be passed on. If we do not accept this assumption, then consumers will pay the costs of the program under either scenario. Assuming that all consumers pay under either approach, the mechanism set forth in the provisional rule will be much less complex and can be more efficiently administered than the Public Advocate's proposal.

Thus, we conclude that the program should be funded by an assessment against the revenues of electric and T&D utilities that may be recovered from ratepayers. This funding determination is based on the principle that those consumers who benefit from a program should pay to support it. Moreover, this approach does not have potential for creating any negative impacts on the competitive marketplace. Finally, the approach avoids a costly and complex funding and reimbursement system that would be required if the electric and T&D utilities initially paid for the cost of the program but were wholly or partially reimbursed by fees on competitive generation providers.[9]

[9]The CEAB has also suggested that if program costs are charged directly to consumers of distribution utilities, these costs should be billed through a charge that is identified on customer bills either as a charge for consumer education or as part of a “public goods” charge. We note that the statute requires electric utilities to issue unbundled bills beginning January 1, 1999. By January 31, 1998, each electric utility is required to file with the Commission a bill unbundling proposal.

Subsection 4(C) of the provisional rule specifies the special assessment mechanism to produce revenues to fund the program. The provisional rule provides that every electric and T&D utility subject to assessment under 35-A M.R.S.A. § 116 is subject to an additional assessment. The assessment is to produce revenues that shall not exceed $200,000 in revenues in fiscal year 1997-98, $600,000 in revenues in fiscal year 1998-99, $600,000 in revenues in fiscal year 1999-2000, and $200,000 in revenues in fiscal year 2000-01.

The CEAB suggested the following timing and allocation of funding:

Phase I: Design (5/98-8/99) $86,000

Phase II: Implementation of Itemized Billing (10/98-3/99) $22,000

Phase III: Implementation of Retail Access (9/99-9/00) $1,257,000

Phase IV: Post Program Follow-up & Contingency (9/00-3/01) $200,000

The assessment mechanism in the rule is based on CEAB's recommendation, anticipating a need to have aspects of the program in place well before itemized billing is in place, continued implementation during a subsequent two-year period, and the possible need for program extension after the main body of the program has been completed. The mechanism further recognizes the need to avoid unnecessary financial burden on ratepayers that might occur if funding of all anticipated program expenses were assessed up front. The CEAB anticipated the need for flexibility in allocating funding and suggested that interested consumers have the opportunity to comment on allocations determined by the Commission in the consumer education plan. We agree. The provisional rule provides that the plan will be subject to public comment.

The rule proposes that funds raised through this mechanism be segregated from other Commission funds in a separate account, the Public Utilities Commission Consumer Education Fund. The rule provides that any funds remaining in this Fund at the

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The Commission is required to adopt a rule by July 1, 1998 establishing unbundled bill requirements. 35-A M.R.S.A. § 3213(1). In that rulemaking proceeding, we will address whether charges other than those for generation, transmission and distribution should be stated separately on bills. Thus, we do not address in this proceeding the manner in which the charge for the cost of the consumer education program will appear on consumer bills.

end of the program "will be returned proportionally to assessed utilities" and flowed through to ratepayers.

E. Section 5: Implementation.

In subsection 5(A), the provisional rule provides that the Commission design and implement the Consumer Education Program (CEP) and that it may hire a consultant to aid it in program design and implementation. This provision is consistent with the Board's recommendation and remains unchanged from the proposed rule.

Subsection 5(B) of the provisional rule provides for the creation of an advisory board to assist the Commission, and any communications contractor the Commission may hire, in the development and implementation of the consumer education plan. The CEAB recommended that the Commission consider creating an advisory board to assist the Commission and its consultant in implementing the consumer education program. The rule as proposed did not provide for the creation of an advisory board. Several commenters suggested that the Commission should adopt this recommendation of the CEAB although views varied on the makeup of the board and its degree of participation in designing and implementing the consumer education program.

Rep. Donald Berry, Sr. suggested the creation of an advisory board as recommended by the CEAB. Such a board would advise the Commission on various issues such as establishing benchmarks and evaluating the success of the program.

The IEPM asserted that the board could be used by the Commission and its consultant for advice and consultation without impeding the implementation of the program. The Public Advocate supported the creation of an advisory board. He noted that:

> consumers, utility representatives, media people and others have a perspective that the Commission should continue to find useful at least for review and comment on the CEP as it is developed by the Commission and its CEP consultant. We do not propose that this board have veto power over the ultimate plan. That power rightly belongs to the Commission.

John Knox recommended establishing a mechanism that would provide for a "2-way critique between the Commission and utilities" of education activities proposed by the Commission and the utilities.

We have adopted the commenters' suggestions to create an advisory board. The board will represent a broad range of

interests and will include representatives of utilities, residential and nonresidential consumers and competitive generation providers. The purpose of the advisory board is to provide information, advice and assistance to the Commission, its staff and the communications contractor in designing and implementing the consumer education program. As suggested by the Public Advocate, the Commission's development and implementation of the consumer education plan and program are not subject to the approval or consent of the board.

Subsection 5(C) of the provisional rule provides that the Commission will issue a proposed consumer education plan and provide an opportunity to comment on the proposed plan; the Commission will adopt a final plan by August 4, 1998. This proposal is consistent with the CEAB's recommendation and remains unchanged from the proposed rule.

Subsection 5(D) specifies that the Commission may modify its plan based on the results of evaluations it has performed. This provision provides flexibility to improve the program as necessary. Evaluations are discussed in our description of section 8.

Subsection 5(E) states that the program will continue through September 2000, with the option to extend the program after that date if the Commission determines that extending the program is in the public interest. This provision is consistent with the statutory timetable for retail access beginning on March 1, 2000. There will be a period of at least several months after retail access begins during which the CEP will have a vital role in helping consumers to make informed decisions and minimizing consumer confusion over the changes that will accompany retail access. Allowing for extension of the program provides the Commission with the flexibility to continue the program beyond September 2000 if we identify the need to do so. This subsection is consistent with the Board's recommendation and remains unchanged from the proposed rule.

Some commenters suggested that more detail about the conduct of the program should be included in the rule. CSE commented that there should be more detail in the final rule about phases and timelines, key goals and objectives, and the percentage of funds allocated to various education approaches, and that the Commission should propose a more detailed rule subject to a new round of comments. We have not included more detail in the rule because, as envisioned by the CEAB, we will develop a detailed plan with the likely assistance of a communications consultant and with the benefit of advice from the advisory board that will be formed pursuant to the rule. See discussion on subsection 5(B) above. The February 1, 1998 deadline set forth in section 3213(2) of Title 35-A requires this

two-step process for developing the consumer education plan. In addition, the February 1, 1998 deadline does not permit a second round of comments before we provisionally adopt the rule. As noted above, however, the consumer education plan will be available for public comment.

F. Section 6: Utility-Sponsored Educational Activities.

As discussed above, the provisional rule calls for the CEP to be funded in the amount of $1.6 million. Under the provisional rule, electric and T&D utilities provide the funding for the education program and recover the costs from ratepayers. Thus, utility ratepayers would provide substantial funds for a comprehensive state-wide educational program. For this reason, subsection 6(A) of the provisional rule states that the costs of any additional educational activities by utilities outside the Commission's program will not be recovered in rates unless the utility demonstrates that such additional efforts are reasonable in amount, reasonably effective, necessary and in the public interest.

MPS agreed with this provision with the exception of educational activities by the electric or T&D utility undertaken to respond to customer or interested person requests for information. This exception is addressed in our discussion of the definition of utility-sponsored educational activities.

The IEPM also supported this provision. It is concerned about the impartiality and credibility of messages sponsored by utilities especially where the utility has a marketing affiliate. It stated that

> [I]t is appropriate to assess any costs of educational activities carried out by the utilities or T&D companies, which are over and above those designed by the PUC and its consultant, to shareholders, unless the utility or T&D company shows these costs to be necessary and in the public interest. Otherwise, ratepayers will be asked to pay twice for the same information.

BHE suggested that utilities should be active participants in educating consumers about retail access, arguing that in addition to the cost of the consumer education program, ratepayers should support to some degree the educational activities undertaken by the T&D utility to educate consumers about retail access. BHE also asserted that the $1.6 million level of funding may be insufficient to fully educate the consumers. BHE stated that it has the "the interest, the neutrality and the capacity to serve as a partner in the task of

informing electric consumers about restructuring." BHE acknowledged, however, that the utility may have a marketing affiliate which may raise concerns about its neutrality in providing information to electric consumers, but stated that there may be ways to overcome such concerns.

We have made only minor modifications to this provision of the proposed rule to clarify that in order to include costs of utility-sponsored educational activities in rates, a utility must demonstrate that expenditures for such activities were reasonable in amount and effective, as well as necessary and in the public interest. As discussed above, however, we have excluded from the definition of utility-sponsored educational activities those activities such as responding to customer inquiries that are not initiated by the electric or T&D utility. This exclusion addresses the concerns raised by utilities about their ability to be responsive to customer requests for information. Moreover, in section 5, we have modified the rule to provide for the creation of an advisory board, which will have utility members. Thus, utilities can continue to advise the Commission about the roles they may play, as part of the consumer education program. Finally, we note that the rule contains a provision allowing electric and T&D utilities to demonstrate that expenditures for utility-sponsored educational activities were reasonable in amount, reasonably effective, necessary and in the public interest. Thus, we conclude that this provision strikes the proper balance between preventing unnecessary costs to ratepayers for the same service and using utilities as a resource in the customer education program.

Subsection 6(B) of the proposed rule required electric and T&D utilities to provide the Commission with all materials related to their own educational activities at least three weeks in advance of publication. Such materials would include brochures, newsletters, bill inserts, and scripts or other descriptions of television and radio ads. This material would not be subject to Commission approval. The provisional rule maintains this requirement but allows for those circumstances where it is not possible for the utility to provide to the Commission some form of the communication three weeks prior to publication.

The purpose of subsection 6(B) is to inform the Commission prior to implementation of utility-sponsored educational activities so that the Commission can work with the utility to avoid inconsistent or contrary educational messages. We note that although the provision does not require approval by the Commission, we would expect the utility to cooperate with the Commission in redrafting messages to avoid confusion to consumers. Access to utility materials will also enhance the

Commission's ability to respond to questions from the public regarding information provided by utilities.

Subsection 6(C) of the provisional rule simply restates the Commission's authority pursuant to 35-A M.R.S.A. § 1303 to investigate any matter relating to a public utility. Thus, under the Commission's investigatory authority, it may determine whether messages conveyed by a utility are misleading, deceptive or inaccurate. We have modified this section, from the proposed rule, as discussed below, to clarify that a utility will be required to stop disseminating information or provide corrected information *only* as a result of a Commission investigation in which it determines that the information is misleading, deceptive or inaccurate.

CMP strongly objected to subsections 6(B) and 6(C) of the proposed rule. CMP argued that requiring the utility to provide information to the Commission in advance of the utility's publication of such information constitutes a prior restraint in violation of the First Amendment of the Constitution, because it "impermissibly restrains the utility from disclosing the information for at least three weeks while the Commission 'reviews' the utility's educational materials." CMP further argued that this provision would allow the Commission to enjoin CMP from disseminating information after the Commission summarily investigated the activity. Finally, CMP argued that a Commission finding that the information is misleading, deceptive or inaccurate is insufficient justification for a Commission order directing a utility to stop the utility-sponsored educational activity. According to CMP, the Commission would be required to seek a judicial determination that materials are factually false or misleading in order to stop the utility from disseminating information the Commission has determined to be false, deceptive or misleading. CMP did state, however, that it is willing to consult with the Commission regarding planned communications with customers.

BHE commented that the scope of investigations under section 6(C) appeared to be broad and was concerned that this section might limit the ability of T&D utilities to communicate information about restructuring. Representative Berry also stated a concern that sections 6 and 7 might raise First Amendment issues. Van Buren Light and Power Co. questioned whether electric and T&D utilities are required to submit information to the Commission that they plan to disseminate in oral presentations.

IEPM supported section 6(B) and (C) of the proposed rule. It stated that these sections "are designed to ensure that the informational materials distributed by the electric utility or T&D company to its customers are consistent with other

consumer messages being used, are objective, and are not misleading or inaccurate." IEPM noted that the majority of cases cited by CMP[10] involve "prior restraints" on publication of material by the press and that the utility's interest in distributing materials to its customers on short notice would not receive the same degree of First Amendment protection as has been accorded freedom of the press.

CSE stated that because utilities have special access to customers through their bill inserts, "we think it imperative to insure that all their 'restructuring information' materials are accurate and in the public interest." CSE also suggested that having utility messages approved by an advisory board or the Commission would help to increase their credibility.

The Public Advocate supported these sections of the proposed rule because they provide the Commission the authority "to ensure that the utilities continue to provide unbiased information about restructuring, consistent with the goal of the CEP."

We conclude that the requirement to file materials before publication does not violate utilities' First Amendment rights. We do not agree with CMP that the provision will delay the publication of material while the Commission reviews it. CMP has not shown why it could not, for example, submit a draft three weeks in advance without delaying publication. The purpose of the three-week prefiling provision is to provide an opportunity for review and for the Commission or its staff to communicate to the utility any concerns it may have about the accuracy of the message. This is consistent with the goals of the CEP to work with the electric and T&D utility to ensure that consumers get information that is objective, accurate, and consistent with CEP program messages. Moreover, as explained below, if the Commission and the utility do not agree on addressing concerns, the rule does not allow the Commission to initially prevent the message from being disseminated. We do not expect that there will be major differences of opinion between the Commission and utilities about the kind of fact-based information that is at issue here and we assume that in the vast majority of cases, if not all, the Commission and utility will be able to resolve the matter without formal action. The provision simply gives the Commission an opportunity to share any concerns it may have with the accuracy or objectivity of a utility message before the message is disseminated to utility customers. Given the potential for a high degree of customer confusion that can result from retail competition, and the restructuring statute's

[10]See *New York Times Co. v. United States*, 403 U.S. 713 (1971); *CBS, Inc v. Davis*, 114 S. Ct. 912, 914 (Blackman, Circuit Justice 1994).

prohibition on any marketing activity by the T&D utility on behalf of its marketing affiliate (35-A M.R.S.A. § 3205), we believe there is ample justification for this provision. For these reasons, we conclude there is no "prior restraint" problem with the rule.[11]

Although we believe the rule as proposed is constitutionally sound, we have modified subsection 6(B) in the provisional rule to accommodate concerns that the 3-week prefiling requirement may delay publication. Under the provisional rule, the 3-week prefiling deadline is flexible if the utility cannot provide the material three weeks in advance without delaying publication. In response to Van Buren Light and Power Co.'s question, we note that the material required to be prefiled would include written drafts of oral presentations to be made by the electric and T&D utility.

We further conclude that section 6(C), as modified to clarify that the Commission will require a utility to stop disseminating information or provide corrected information *only* as a result of a Commission investigation in which it determines that the information is misleading, inaccurate, or deceptive, is constitutionally sound, authorized by Title 35-A §§ 1303 and 1306, and necessary to ensure that the goals of the consumer education program are not compromised. We note that there is no First Amendment protection for false, deceptive, or misleading commercial speech. In *Friedman v. Rogers,* 440 U.S. 1 (1978), the Supreme Court, in upholding a regulation on the use of optometrical trade names, noted that state restrictions on false, deceptive, and misleading speech are constitutionally permissible. The Court quoted with approval the following excerpt from *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976):

> Untruthful speech, commercial or otherwise, has never been protected for its own sake. Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of

[11]We agree with IEPM that the news media prior restraint cases are inapposite to the regulation of commercial speech in order to prevent the dissemination of deceptive or misleading information. See *Friedman v. Rogers*, 440 U.S. 1, 9 (1978) (restrictions on false, deceptive and misleading commercial speech are permissible).

> commercial information flow cleanly as well as freely.

Friedman, 440 U.S. at 9-10, quoting *Virginia Pharmacy* 425 U.S. at 771-772 (citations omitted).

We further note that there was no requirement in *Friedman* that a court determine that the use of trade names was deceptive and misleading. The Court looked at the evidence before the legislature and determined that the concerns of the Texas Legislature about the deceptive and misleading uses of optometrical trade names were "not speculative or hypothetical." Thus, if under this rule, and the authority delegated to us pursuant to sections 1303 and 1306 of Title 35-A, we determined that a practice were misleading or deceptive, we would be fully justified in ordering the utility to change that practice to insure "that the stream of commercial information flow cleanly as well as freely."

We note that Maine's electric utilities have demonstrated in their comments a willingness and desire to work with the Commission to avoid situations such as those that might lead to an investigation. We welcome this spirit of cooperation and are hopeful that this section will be infrequently used. Nevertheless, our interest in insuring that consumers receive objective and truthful information about restructuring warrants having in place a mechanism to address those situations in which consumers are subjected to information from an electric or T&D utility that is deceptive or misleading.

G. Section 7: Dissemination of Information

Section 7 of the provisional rule states that the Commission may require electric utilities to disseminate information produced as part of the Commission's consumer education program. Such required dissemination of information would likely be through bill inserts which provide a convenient and direct method of reaching consumers. This subsection also provides that the Commission may require the utility to disseminate information that clarifies or corrects a confusing, inaccurate, or misleading message provided by the utility. As discussed above, a cooperative process should enable the Commission to correct in advance any utility-sponsored messages that might confuse consumers. In the event that the cooperative process envisioned in the rule breaks down, this provision of the proposed rule allows the Commission to correct the problem by requiring the utility to provide the correct information. This may be done through bill inserts or some other method. We have modified the proposed rule to clarify that such corrections will be required only after an investigation has resulted in a

Commission determination that the utility-sponsored educational activity is misleading, deceptive, or inaccurate.

CMP also claimed that this provision of the proposed rule violates its constitutional rights of free speech, asserting that the case of *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986) (plurality opinion) stands for the proposition that the Commission cannot require a utility to disseminate any information with which that utility disagrees. No other utility objected to the utility dissemination of consumer education program materials.

IEPM supported this provision and disagreed with CMP's First Amendment analysis. IEPM noted that the PG&E case is distinguishable because it involved a commission order requiring a utility to provide the "extra space" in its billing envelopes to an intervenor group for that group's use in raising funds and communicating with ratepayers. IEPM noted that the Court distinguished this case from those in which the California commission has required that certain information be provided in billing envelopes.

The Public Advocate supported this provision (as well as section 6) based on the importance to the market of having an informed group of consumers and the ability of electric utilities and T&D utilities to reach Maine electricity consumers.

We agree with the IEPM that the requirement in the proposed rule that the utility disseminate information produced as part of the Commission's consumer education program does not violate utilities' First Amendment rights of free speech. The *Pacific Gas* case should not be broadly interpreted as holding that a utility need never disseminate information generated by a public utilities commission if the utility disagrees with such information.[12] Moreover, the information that will be generated by the consumer education program, will be objective, factual information. Thus, the Supreme Court's concern that a utility should not be forced to express views on policy matters with which it disagrees is simply not present here. C*f Pacific Gas*, 475 U.S. at 14 (utility had right to be free from government

[12]The Court in *Pacific Gas* distinguished the California commission's requirement that the utility disseminate the views of an intervenor group from constitutionally permissible orders requiring the utility to disseminate notices of proceedings or information about changes in the way rates are calculated. The Court noted that "[t]he State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations." *Pacific Gas*, 475 U.S. at 15, n. 12, (citations omitted).

restrictions that abridge its own rights in order to enhance the relative voice of its opponents).

We have modified section 7 from the proposed rule to clarify that a utility will be required to disseminate a correction of previously disseminated utility-sponsored information only if such a correction is required by the Commission as a result of an investigation, undertaken pursuant to section 6(C). This modification is consistent with the modification to the language of section 6(C).

H. Section 8: Program Research, Monitoring and Evaluation; Reports to the Legislature

This section contains the various processes through which the Commission may measure, test and evaluate the success of its consumer education program. This section also provides for reports to the Legislature on the results of its program evaluation.

BHE suggested that the rule should incorporate a specific target for measuring the success of the consumer education program, such as that using a measure of 60 percent aided-recall[13] of key message points measured on a region-to-region basis may be an appropriate benchmark for the success of the CEP. This benchmark was adopted in the California consumer education program.

IEPM agreed with BHE that it would be useful to establish benchmarks in the rule. IEPM stated that if the target is not established in the rule, it should be established by the Commission's consultant at the outset of the program. Finally, IEPM suggested that penalties for failure to meet targets could provide an added incentive to succeed.

CEI stated that the Commission should establish initial criteria for monitoring the plan or at least give some direction to a consultant for developing the criteria for monitoring the plan. CEI also suggested the Commission adopt the 60 percent aided recall target established in California, with the option of modifying the initial level based on input from the commission's consultant and members of the public and also based on the experience of other states in using benchmarks.

[13]The terms "aided recall" or "aided awareness" have been defined as "the ability of customers to recall certain pieces of information that they were exposed to when prompted or coached by an interviewer." Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industries and Reforming Legislation, Rulemaking 94-04-031 (Calif. PUC Aug. 1, 1997).

CMP recommended that the evaluator of the program be independent from the entity implementing the program.

We have modified the proposed rule to indicate that the plan will establish criteria, including target levels to evaluate the success of the program. By insuring that there will be benchmarks in the plan, the provisional rule addresses concerns that the plan contain some mechanism for measuring the success of the program. However, by not establishing a specific benchmark, the rule provides the flexibility to allow the Commission to consider the advice of any consultant it may hire, the advice of the advisory board, and research on the results of education programs in other states in arriving at specific benchmarks or target levels. In addition, the rule provides that there will be an opportunity for public comment on the proposed plan. Thus, there will be further opportunity for public comment than there would be if specific benchmarks were adopted as part of this provisional rule. We do not establish in the rule requirements for the entity evaluating the program. Such a requirement may be considered in developing the consumer education plan. We note, however, that the use of benchmarks, target levels or some other similar objective criteria for evaluating the success of the program may obviate the need for a separate entity to conduct the evaluation process. We do not see a need for a penalty for failure to meet the established benchmarks, and we do not adopt this suggestion in the provisional rule. We note that in such places where a penalty has been adopted -- California, for example -- utilities are responsible for conducting the education program.

Accordingly, we

O R D E R

1. That the attached Chapter 302, Consumer Education Program is hereby provisionally adopted;

2. That the Administrative Director shall submit the provisionally adopted rule and related materials to the Legislature for review and authorization for final adoption;

3. That the Administrative Director shall file the provisionally adopted rule and related materials with the Secretary of State; and

4. That the Administrative Director shall send copies of this Order and attached rule to:

A. All electric utilities in the State;

B. All persons who have filed with the Commission within the past year a written request for notices of rulemakings;

C. All persons on the Commission's list of persons who wish to receive notice of all electric restructuring proceedings;

D. All persons who have filed comments in Docket No. 97-583; and

E. The Executive Director of the Legislative Council (20 copies).

Dated at Augusta, Maine this 30th day of January, 1998.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Hunt